IN THE MATTER OF ARBITRATION BETWEEN

Becker Education Association	) OPINION AND AWARD) Grievance Arbitration:) 1) Timeliness) 2) Overload Pay
-and-	)
	) Arbitrator:) John W. Boyer, Jr.
Independent School District No. 726 Becker, MN	)) BMS 06-PA-1053

APPEARANCES

For Becker Education Association
William F. Garber, Attorney – EDUCATION MINNESOTA
Darrell D. Baty, Field Representative – EDUCATION MINNESOTA
Janet Baughman, Grievant

For Independent School District No. 726
J. Dennis O'Brien, Attorney
LITTLER MENDELSON
Steven Dooley, Superintendent
Chris Kleppen, Vice Chair – School Board
David Lund, Sr. High Principal
Jason Wilken, Special Education Dept. Chair and Teacher
(Appearance by Subpoena)

Date of Hearing
November 10, 2006

Close of Hearing
December 18, 2006

STATEMENT OF JURISDICTION

Pursuant to the Public Employee Labor Relations Act, as amended, and Article VI - Grievance Procedure of the Agreement, the Issues as determined by the Arbitrator and stated below were submitted to Arbitration.

At the Hearing each of the Parties presented testimony under Oath, was afforded full opportunity for examination and

cross-examination of witnesses, and submitted exhibits in support of their respective positions. The Parties elected to submit post-Hearing briefs, such were duly received, and the Hearing was declared closed.

THE ISSUES

Issue 1 – PROCEDURAL: Timeliness/Arbitrability

Did the Association process the grievance in a timely manner?

Issue 2 – SUBSTANTIVE: Overload Pay

Did the Employer violate the Agreement and/or past practice when it acted to deny the Grievant's request for "Overload Pay" for her missed Preparation periods? If so, what shall be the appropriate remedy?

BACKGROUND

The dispute involves interpretation of the 2005-2007 Agreement and applicability of a past practice, and some of the facts giving rise to the matter are in dispute.

The Employer is a school district in central Minnesota, and the Grievant is a Special Education teacher in the District. The genesis of the matter is the Grievant's request for Overload Pay pursuant to the Agreement for the period September – October, 2005 for Preparation periods allegedly denied her.

Further, the Parties dispute the timeliness of submission of the grievance and the extent to which such ought bar the Arbitrator's authority to render an Award premised upon the substantive merit(s) of the matter.

During Spring 2005, the Grievant requested permission of her Principal to develop a vocational program for four (4) of her students that would involve job skill training while working in the St. Cloud Hospital's laundry and baking departments. The

program would require the Grievant to be with the students at the job site for approximately one half (1/2) of her workday for 2-3 days per week, rather than in the school building.

The Record indicates that at some point the Sr. High Principal and Superintendent individually suggested and/or proposed the Grievant meet the students at the job site, rather than at the school and have to travel with the students to the work site, and proposed the hiring of a Paraprofessional to assist the Grievant. However, the Grievant allegedly declined both proposals, contending an additional teacher was required, not a Paraprofessional. Further, the Grievant was also assigned other students that required IEP time in addition to the vocational program cited.

The Record clearly indicates the established practice was to permit Special Education teachers to arrange their individual schedules to include the disputed Preparation Periods/time. However, while there is no dispute the Grievant did not have Preparation periods during the time cited, the Parties have disparate positions relative to the extent to which the Employer was notified of such.

The Grievant contends she routinely submitted her daily work schedules that did not include Preparation periods to her Principal, and the number of students assigned to her per IEP functioned to preclude time for Preparation periods. Conversely, the Employer contends the Grievant gave no indication of being unable to have Preparation periods until submittal of her request for payment that initiated the grievance process.

The Record also indicates disparate positions relative to the timely submission and processing of the matter to Arbitration pursuant to Article VI, Section 7 that provides explicit time requirements for requesting Arbitration and/or

selection of the Arbitrator. The Employer contends the Association was untimely in the Arbitrator selection process, premised upon a recent unpublished Court of Appeals Minnesota decision (ISD No. 1 Aitkin MN v. Minnesota Education, - Aitkin – 2006) hereinafter referred only as "Aitkin decision" that upheld the sanctity of such time limits and concluded an Arbitrator was precluded from addressing the Substantive matter in such matters where time requirements had not been satisfied. However, the Association contended the Arbitrator's selection had not occurred within the specified ten (10) days because the Parties continued to meet and waive such limits in an attempt to resolve the matter prior to Arbitration. Further, the Association contends the provisions are outdated given the reference to "PERB" is to an entity that no longer exists, and the Court decision above is less than controlling and not relevant in this matter.

Accordingly, the Grievant submitted a request for Overload Pay for her missed Preparation periods on November 1, 2005 for the thirty-five (35) day period in dispute. When such was denied, the Association filed a grievance on November 28, 2005 that provided in relevant part:

> Statement of Grievance
>
> The School District violated the contractual rights of Janet and three other Special Education teachers when it denied payment for Overload Pay for preparation time on November 11, 2005.
>
> Remedy Requested
>
> Pay for Prep time lost at the contractual rate.

However, the Employer consistently denied the position and request of the Association on the basis of an alleged long-standing practice that such Special Education teachers schedule their Preparation periods at the most opportune time for them

and their students. It also contended the Grievant had "chosen" not to utilize the Preparation time she had been offered, and refused Paraprofessional assistance and opportunity to meet the students at the work site near her residence, and had not notified the Employer of the matter prior to submittal of the request for payment.

Therefore, given the Parties were unable to resolve the dispute and stipulate to an absence of procedural deficiency other than that addressed, the matter was reduced to writing in accordance with Article VI – Grievance Procedure and appealed to Arbitration.

PERTINENT PROVISIONS OF THE AGREEMENT (Excerpts Only)

GRIEVANCE PROCEDURE – ARTICLE VI

> Section 7 Subds. 1-3 & 8. In the event that the teacher and the School District are unable to resolve any grievance, the grievance may be submitted to arbitration . . . in writing, signed by the aggrieved party . . . Upon the proper submission of the grievance under the terms of this procedure, the Parties within ten days after the request to arbitrate, shall attempt to agree upon the selection of an arbitrator. Either party may request the PERB . . . The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure. The jurisdiction of the arbitrator shall not extend to . . . any grievance which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure as outlined herein . . .
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> * * *
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> HOURS OF SERVICE – Article VIII
> Section 6, Subds. 1-3. teachers are to be allowed preparation time to equal approximately 245 minutes over a normal 5 day week . . . Secondary teachers will be allowed one period of preparation time of forty-nine (49) minutes . . . Teacher preps shall be in blocks of no less than 24 minutes.

* * *

BASIC RATE OF PAY – Article XI
Sections 1-2. The wages and salaries . . . shall be a part of the Agreement for the 2005-2006 and 2006-2007 school years . . . A teacher shall be compensated according to the last individual contract executed between the teacher and the School District until such time that a successor agreement is executed.

* * *

EXTRA COMPENSATION – Article XII
Section 3. Every attempt will be made by the School District to avoid assigning teacher to extra-period classes. Should their assignments become necessary, the building principal will attempt to make assignments on a fair, equitable basis. The reimbursement shall be at the rate of $20.00 for 2005-2007, per period assigned, payable every three months.

POSITION OF THE PARTIES

The position and requests of the Parties on each of the Issues were outlined by their representatives and supported by a variety of documents and testimony as follows:

THE ASSOCIATION

Issue 1 – PROCEDURAL: Timeliness/Arbitrability

1) The matter was timely filed. The Parties as a matter of general practice agreed to continue to attempt settlement prior to selection of an Arbitrator.

2) The Association did not receive a list of Arbitrators from PERB, and that provision is obsolete given such refers to a non-existent governmental entity.

3) The Employer failed to provide any basis for its allegation of a lack of timeliness and never cited the Appeals Court decision prior to the Hearing.

4) The Court of Appeal's decision is not relevant given the instant Association did not pursue or discuss the dispute for a prolonged period as occurred in the Aitkin matter.

5) Requested the Arbitrator to deny the Employer's motion for dismissal, and to find the matter timely and properly subject to review upon its substantive merit.

Issue 2 – SUBSTANTIVE: Overload Pay

1) The Employer violated the Agreement when it denied the Grievant's request for Overload Pay despite her uncontested lack of the bargained Preparation period time during the first quarter of the 2005-2006 school year.

2) The Employer assigned too many IEP hours to the Grievant and others that precluded their scheduling of Preparation time.

3) The District's offer of a Paraprofessional employee to assist the Grievant would not have relieved her of the required IEP minutes.

4) The Grievant's work day schedules showing no Preparation time was routinely given to the Principal at least once at the beginning of the school year. Similarly, the various other documents provided the Principal ought to have informed him of the absence of Preparation time.

5) The Grievant's scheduled time at the hospital worksite allowed no time for anything but student-teacher contact.

6) That upon return to the school building, the Grievant's time with the exception of lunch that was often used for meetings with other teachers, left no time for Preparation given she was scheduled for two (2) full blocks of IEP time.

7) The Grievant could rightfully assume her lack of a Preparation period was known to the Employer given its student schedules.

8) The Grievant was a professional and acted in a professional manner to provide the legally required level of service to her students, and such caused her to be denied Preparation time.

9) The Grievant did not complain about the denial of Preparation time and performed her job, and the Employer ought not blame her for the matter.

10) That Special Education teachers make their own schedules, but cannot be blamed for a failure to schedule Preparation time when they are assigned too many student hours.

11) The Grievant could have made the problem known earlier. However, the Employer cannot hide behind the assertion that those who fail to schedule a Preparation period due to a lack of time have created their own problem and not be able to recover for such financial loss.

12) There is no contention the Grievant's calculation of lost Preparation periods is not accurate.

13) The Grievant is not requesting compensation for her volunteered work while off-duty or during her duty-free lunch period, but only for the contractual Preparation periods she was not permitted to utilize.

14) Requested the Arbitrator to sustain the grievance, and to direct the Employer to compensate the Grievant for the lost Preparation time in dispute.

THE EMPLOYER

Issue 1 – PROCEDURAL: Timeliness/Arbitrability

1) The grievance was processed in an untimely manner and must be dismissed, given the Association violated the time limits of the Grievance Procedure for selection of an Arbitrator.

2) A recent MN Court of Appeals (Aitkin) decision upheld the dismissal of such a grievance, and concluded an Arbitrator shall not have authority over a grievance not processed in a timely manner.

3) The Association did not communicate with the Employer relative to Arbitrator selection until nearly three (3) months beyond the contractual deadline.

4) Requested the Arbitrator to find the grievance untimely processed, and subject to dismissal upon the Procedural basis.

Issue 2 – SUBSTANTIVE: Overload Pay

1) The Employer did not violate the Agreement, and the Association failed to meet its required burden of proof. Submitted numerous Arbitral references relative to the Association's obligation as the "moving party" to meet that burden allegedly supportive of this contention.

2) That prior to the Hearing the only evidence submitted by the Association to support its claim is the e-mail of November 1, 2005 with the Grievant's request for payment.

3) The Grievant was argumentative and uncooperative when questioned relative to the Employer's practice of permitting Special Education teachers to develop their own schedules.

4) The Grievant provided no evidence the vocational program negatively affected her access to Preparation time. Rather, it is apparent the Grievant merely chose not to take her Preparation periods.

5) The past practice of permitting Special Education teachers to schedule their own Preparation time is both clear and long-standing. Submitted Arbitral references relative to the binding effect of such past practice(s).

6) The Employer recognizes Special Education teachers have both the best understanding and methods of application of professional judgment to effectively allocate time for Preparation. Submitted an Arbitral reference allegedly supportive of the contention.

7) There is no provision in the Agreement providing for additional compensation for such non-utilized Preparation time.

8) The past practice of Special Education teachers scheduling their own Preparation time cited above is clear and long-standing, but has been changed as a result of this grievance.

9) The Grievant volunteered for the vocational program, and such was not assigned as an extra class period.

10) The Grievant complied with the past practice until it was not financially advantageous for her.

11) The Association has neither contested nor attempted to modify the past practice at any time up to and including the most recent 2005 negotiations.

12) The Employer is under no contractual obligation to compensate the Grievant for her voluntary activities. Submitted an Arbitral reference allegedly supportive of this contention.

13) Requested the Arbitrator to deny the grievance of the Association in its entirety.

OPINION AND AWARD

On the basis of the considered evaluation of all documents, testimony and arguments presented by the Parties, the decision of the Arbitrator on each of the Issues follows:

Issue 1 – PROCEDURAL: Timeliness/Arbitrability

On the basis of the considered evaluation cited, the decision of the Arbitrator is to deny the position of the Employer. The primary reasons for the Award are the following:

1) The Arbitrator is impressed with the Association contention it was proceeding on the basis and practice that selection of an Arbitrator could/would be deferred until attempts to settle/resolve the dispute were determined to be unsuccessful. Such practice is common and often mutually beneficial, and shall not be construed to suggest the grievance has been either forgotten or abandoned by the "moving party". Further, in the instant matter there is no evidence of any meeting(s), discussions, etc. during the interim intended to attempt such resolution.

2) Given the absence of any prior problem of timeliness between the Parties, and the continuing reference to an obsolete Arbitral impaneling agency (the PERB) in the current Agreement, the Arbitrator is compelled to conclude the "selection process" has not been an issue for the Parties and has not been literally followed as explicit and/or implicit in the Employer's Motion for Dismissal.

3) The Arbitrator is also compelled to conclude the Issue and its late appearance in the Grievance Procedure at the Arbitration Hearing was the result of the Employer's receipt of the recent MN Appeals Court (Aitkin) decision upon which the Motion for Dismissal is predicated. However, the Arbitrator is compelled to characterize such as less than controlling and/or dispositive of the matter for the following:

A) The decision was unpublished and virtually unknown to either of the Parties principals during the processing of the grievance, and first introduced by the Employer at the Hearing.

B) The Arbitrator would not contest the Employer position such an unpublished and virtually unknown decision ought be influential at this time, if the fact set of the Aitkin matter were identical or substantially equivalent to the instant matter. However, examination of the fact set of Aitkin indicates such is clearly disparate from the instant matter given the Aitkin decision is clearly premised upon an extreme delay by the Association of nearly six (6) months during which the matter was not discussed and/or pursued, and could arguably be construed to appear to be in a "black hole" characteristic of being dropped and/or abandoned. Clearly, such non-processing of a grievance could readily be construed as inconsistent with bargained time criterion, and without commenting on the Aitkin Award, is frequently found to be an applicable criterion for an Arbitrator's conclusion the exclusive bargaining representative has waived its right to continue and the Arbitrator would be exceeding his authority vested by the Agreement by addressing the substantive merits of such an untimely matter, as was the Courts finding in Aitkin.

However, in the instant matter the grievance has been routinely processed and discussed in a reasonable manner, given the absence of any continuing liability, through the Arbitrator selection process to the instant Hearing.

Therefore, given the conclusions above, the Arbitrator is compelled to deny the position of the Employer, and to find the matter properly subject to adjudication upon its substantive merit(s).

Issue 2 – SUBSTANTIVE: Overload Pay

On the basis of the considered evaluation cited, the decision of the Arbitrator is to deny the grievance of the

Association. The primary reasons for the Award are the following:

1) Initially, the Arbitrator can readily empathize with the mutual concerns and apparent frustration inherent in the disparate positions of the Parties when confronted with the emotion-laden matter of Special Education teachers exercising judgmental freedom to schedule their unique work day(s) and requirement they often coordinate activities in both a traditional school and off-site work experience area, with the assumption they schedule bargained Preparation/planning time and comply with all applicable Federal and State laws, that necessitates adjudication through these proceedings.

Therefore, the Award shall not be interpreted as reflecting upon the integrity of the principals given the behavior of each exhibited at the Hearing could be characterized as an open, reserved, and sincere attempt to provide convincing argumentation supportive of their positions. Nevertheless, the Award was predicated upon well documented standards of contract interpretation recognized by both the principals in a dispute and neutrals alike.

2) The Arbitrator is impressed with the professionalism of the Grievant, given she demonstrated a prolonged and apparently genuine concern for the education and care of her uniquely demanding and/or capable student group. Similarly, she appears to be equally conscientious, committed and creative in the exercise of her uniquely demanding duties.

Therefore, it is unfortunate the personal choices and actions of such a professional are at the crux of the dispute. Further, while not controlling, the Arbitrator can only hope there shall be no “fall-out” from the dispute that would explicitly and/or implicitly function to limit such obligations, and the mutually advantageous flexibility in scheduling inherent

in the delivery of quality Special Education services to that student population.

3) The Arbitrator clearly acknowledges and appreciates the existence, rationale and mutual merits of the Parties long-standing practice of permitting Special Education teachers to create and maintain their own work schedules. Such practice has clearly provided the mutual benefits of creating the best possible balance of "customized" student education and utilization of traditionally non-student contract hours such as lunch and Preparation periods.

Therefore, while the practice has arguably been modified as a result of this dispute, the Award shall not be construed to limit and/or otherwise modify such. Simply stated, the Award shall not be interpreted to explicitly and/or implicitly infer that school Principals shall be obligated to verify each Special Education teacher has scheduled the required Preparation time.

4) The Arbitrator is compelled to find the provisions of Article VII, Section 6 as cited in detail above to be unequivocally clear, that:

> "Secondary teachers will be allowed one period of Preparation time of forty-nine minutes per day."

There is no dispute the Grievant did not utilize the contractually directed time periods of the Agreement.

However, the genesis of the dispute is the determination of whether the Grievant was "allowed" that contractual Preparation time, and the appropriate remedy if she was not allowed such. Further, a determination of "allowed" is grossly more easily defined in a typical traditional classroom setting where daily schedules are unilaterally or mutually scheduled to the exact minute on the basis of class periods, and non-student contact hours such as Preparation and lunch periods, etc.

However, in the instance of Special Education teachers, such an “allowance” is rendered far more difficult to define and/or determine. In the instant matter, the Parties have developed a programmatic and mutually beneficial practice of permitting each teacher the flexibility to establish, maintain and/or modify their daily work schedules in order to make the most effective use of their time and to maintain the optimal balance of student contact and non-contact time.

Accordingly, the Arbitrator is compelled to conclude the Parties have the clear expectation these teachers will schedule the prescribed Preparation periods into their daily work schedules at the most appropriate time of the work day. The Record clearly indicates the practice has functioned extremely well for all Parties, and ought not now be abandoned. However, in the instant matter a teacher vested with such opportunity to develop her schedule with the expectation it would include Preparation time as in the past, did not schedule such for a variety of alleged reasons, and is requesting compensation for the “lost” Preparation time opportunities.

Accordingly, the cogent determination is the following: A) Whether the Grievant was not able to schedule the periods or personally chose not to schedule such? B) Whether in either or both instances, the Employer “allowed” her the specified periods of Preparation time? and C) Whether the teacher (Grievant) has the responsibility of promptly and directly informing the Employer of an inability to schedule such or simply chose not to schedule such and/or to make that notification, and on what basis the decision(s) was made?

5) Given the findings above, the Arbitrator is compelled to conclude on the basis of the totality of the Record the Employer had taken the established and reasonable action required to allow the Grievant to schedule her Preparation

period entitlement, but the Grievant when vested with that authority and responsibility failed to schedule such despite the Parties clear practice and expectation. The basic reasons for such conclusion follow:

A) The Parties have created and continued the mutually beneficial practice of vesting/allowing Special Education teachers the authority, flexibility and responsibility for creating their own daily schedules. Further, the incontrovertibly clear expectation during the history of such practice is they will schedule Preparation periods. The Record indicates there had been no other instance(s) of such teachers, including the Grievant, failing to make such scheduling accommodations.

B) The Record also indicates that prior to receipt of the instant request for payment and/or notification of the Grievant's inability to schedule daily Preparation time the Superintendent had informally offered her Paraprofessional assistance, and the Principal had suggested she meet her students at the worksite near her residence rather than at the school and then travel back to that site with them. The suggestions were rejected by the Grievant for allegedly personal reasons, but clearly would have functioned to provide greater daily flexibility and "free time" for any combination of duties including Preparation periods, and must be construed as indicative of the Employer's supportive and cooperative position of willingness to address any such "off-site" scheduling requirements often unique to the Special Education professional, when aware of such.

C) More significantly, the Arbitrator has concluded it was the Grievant (teacher) who had the authority and responsibility for developing a daily work schedule inclusive of Preparation time, but she made the choice not to do so and the

complicating choice of not directly informing her Principal that her daily schedule did not include the contractually mandated Preparation periods.

Simply stated, given the long-standing and understood practice and the provisions of the Agreement, the Grievant as an experienced teacher must be assumed to have immediately realized her lack of Preparation periods was “wrong”, and was obligated to notify the Employer in a direct and forthright manner to permit an administrative reaction to correct the matter and/or to assess the financial impact of non-response, etc. Accordingly, the Arbitrator is compelled to reject the explicit and/or implicit contention of the Association the Grievant simply assumed the Principal would “discover” the deficiency from routine scheduling documents submitted without any “heads up” notice of the unique problem. Clearly, such an assumption must be construed as less than reasonable and/or minimally acceptable given the totality of circumstances in the matter. However, as cited above, the Record indicates an absence of any such notification until the Grievant’s submittal of the request for payment for the disputed time.

D) The Arbitrator acknowledges the Grievant’s contention her assigned work load precluded the scheduling of Preparation time. Similarly, shortly after the Grievant’s request for the compensation in dispute the Employer added another Special Education teacher to work with some of the Grievant’s students.

Therefore, the Arbitrator prefers to leave the reasons for the Grievant’s choice not to schedule Preparation time to conjecture. However, the controlling fact is the Employer “afforded” or “allowed” the Grievant the opportunity to schedule herself coupled with the expectation such schedule would include the contractually mandated Preparation time, but the Grievant

chose to create and follow a schedule without such, and chose not to notify and/or discuss the matter with supervision.

Accordingly, it was incumbent upon the Grievant to create the appropriate work schedule or to make the basis for such an alleged inability to comply with the Agreement, practice and expectation known to the Employer.

Therefore, the Arbitrator is compelled to reject the explicit and/or implicit contention of the Association the Grievant's work schedule(s) without Preparation periods were routinely provided the Principal as cited above, and/or the latter was aware of the IEP's assigned her and assumedly aware of the resultant inability to schedule the Preparation time. Rather, the Arbitrator is compelled to conclude the Grievant's behavior, even if arguably well-intended, must be characterized as "laying in the weeds". Simply stated, had the Grievant made known she was unable to schedule Preparation time for some rationale, and the Employer either failed to respond or condoned the result, the Award would/could have favored the Grievant. However, such must also remain for conjecture.

6) Accordingly, given the analysis and conclusions above, should the Association continue to perceive inequity in the interpretation of the contractual provisions at Issue, the appropriate and readily available forum is the process of compromise and concession characteristic of collective bargaining. However, the extent to which such may be instructive, the Arbitrator also prefers remain for conjecture.

Finally, the Record indicates the Grievant reacted in the affirmative to the Arbitrator's question of the extent to which the Association had afforded full, fair and/or adequate representation throughout the proceeding.

Therefore, on the basis of the analysis and conclusions above, the Arbitrator is compelled to render the Award.

AWARD

The decision of the Arbitrator on each of the Issues follows:

Issue 1 – PROCEDURAL: Timeliness/Arbitrability

The decision of the Arbitrator is to deny the Employer's Motion for Dismissal, and to find the matter properly subject to adjudication upon its substantive merit(s).

Issue 2 – SUBSTANTIVE: Overload Pay

The decision of the Arbitrator is to deny the grievance of the Association in its entirety.

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John W. Boyer, Jr., Ph.D.
Arbitrator

Dated: 2/2/07 .